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JAMES R. BROWNING, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 785.

EASTERN AIR LINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

REPLY OF EASTERN AIR LINES, INC. TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI.

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April 20, 1960.

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Introduction.

Eastern Air Lines, Inc. ("Eastern") replies herewith to briefs in opposition to certiorari filed by Capital Airlines, Inc. ("Capital"), Delta Air Lines, Inc. ("Delta"), Northwest Airlines, Inc. ("Northwest") and the Civil Aeronautics Board ("the Board" or "the CAB").[1]

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[1] Capital and Northwest have also moved to be named parties respondent and requested leave to file briefs in opposition to Eastern's petition for certiorari. Eastern does not oppose those requests.

Reference to the briefs of the parties in opposition to certiorari will be by commonly recognized abbreviations in parentheses followed by the specific page number to which reference is made, as, for example, (CAP 1), (DAL 2), (NWA 3) and (CAB 4). A reference to Eastern's petition for certiorari will be in the same form, as, for example, (EAL 5) and reference to the joint appendix in the Court below, certified to this Court will be in comparable form, as, for example, (J. A. 6a).

In its petition for certiorari, Eastern set out four questions on which certiorari was requested, namely: (1) the proper concept of public convenience and necessity as that term is used in airline route proceedings, (2) the scope and meaning of the "*Ashbacker*" doctrine,[1] (3) the practice of administrative agencies of predetermining litigated controversies by "press release" without considering all the pertinent facts, and, (4) the standards of ethical conduct required by an applicant asserting its fitness to engage in air transportation, particularly with regard to certain *ex parte* contacts made by Capital to the CAB.

Capital and Northwest allege that none of the four questions raised by Eastern warrant review by the court while Delta asserts that points one (1) and three (3) do not merit review and expresses no opinion on point four (4).[2] The Board opposes review of questions one (1), three (3) and four (4) but equivocates on the *Ashbacker* problem raised by point two (2). The Board supports the decision of the court below on *Ashbacker,* but points out that if this Court decides to review the *Ashbacker* problem in No. 777, then this case should be reviewed on that issue as well.

With respect to the first question, the parties opposing review of the standards of public convenience and necessity allege that the Board in the proceedings before it made proper findings on various recognized standards of public convenience and necessity, that the Court below sustained those findings (CAP 11-13, 18-21), (DAL 2-12), (NWA 12-

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[1] *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U. S. 327 (1945).

[2] Delta asserts (DAL 2, n. 1) concern with question two (2) ("*Ashbacker*") and states that it has addressed itself to that point in its Reply in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, No. 777 in this Court.

16), (CAB 8-9)[1]; and that there is no conflict in the decisions of the Courts of Appeal.

On *Ashbacker*, the second point, Delta expressed no views.[2] Capital alleges that there is no conflict between the decision below and the decision in other cases, and that the case below was decided on the ground Eastern did not make any showing of mutual exclusivity (CAP 14, 28-29). Northwest's position is essentially the same as that of Capital, and, additionally, Northwest asserts that any "*Ashbacker*" error in the proceedings below was obviated by a subsequent proceeding in which certain of the service issues raised by the proceeding before the Board below were again litigated (NWA 16-24). The Board says that the decision below on the *Ashbacker* question was not "necessarily inconsistent with" the decision in *Delta* v. *Civil Aeronautics Board*, the appeal of the *St. Louis-Southeast Case* to the District of Columbia Circuit (CAB 9).[3]

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[1] To establish its position on Eastern's points one (1), three (3) and four (4), the Board relies primarily upon its Memorandum filed in No. 777 in this Court. Eastern desires this Court to consider Eastern's reply dated April 18, 1960, in that case to the answers in opposition to petition for certiorari. Similar issues are presented in that case, also involving fundamental principles of due process and statutory construction in airline new route proceedings before the Board. The cases are parallel proceedings before the Board, the same issues of public convenience and necessity and of procedural due process were raised, the same arguments were made to the respective Courts of Appeal and the questions presented for certiorari by this Court are the same in both cases. The *St. Louis-Southeast Case*, CAB Docket 7735, *et al.*, was appealed to the District of Columbia Circuit and is now pending as *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, No. 777, here, as well as in the style of *Trans World Airlines, Inc.* v. *Civil Aeronautics Board*, No. 679. The *Great Lakes-Southeast Case*, CAB Docket 2396, *et al.*, was appealed to the Second Circuit and is now pending in this case and, as well, in *Capitol Airways, Inc.* v. *Civil Aeronautics Board*, No. 786.

[2] See 2, note 2, above.

[3] And now pending in this Court as Numbers 679 and 777.

On point three (3), all opposing parties assert that the Board did not prejudge the proceeding before it by issuing a "press release" decision and that the Court below properly refuted Eastern's contention (CAP 14-15, 21-23), (DAL 12-19), (NWA 24-28), (CAB 8-9).

Neither Delta nor Northwest discussed the issue of Capital's fitness raised by reason of *ex parte* contacts made by Capital's agents with the CAB. Capital asserts that the Court below fully considered the matter of its *ex parte* contacts and arrived at the right decision (CAP 24-28, 29-31). The Board appears to take the position that, on the facts shown by the record, the Court below reached the proper result (CAB 11-12).

Eastern replies, in the order in which its questions were presented in its petition for certiorari, as follows:

I.

Reply to the answers relating to adequacy of findings on the elements of the public convenience and necessity.

The question here is simple, when isolated from the confusion in which the opponents of certiorari have attempted to clothe it and, moreover, it is a matter of public concern on which enlightened guidance from this Court is desirable in the absence of any clear pronouncements from the Courts of Appeal or from the Board itself. Eastern asks this Court to declare what basic findings on the elements of the public convenience and necessity are essential to sustain a conclusion that a proposed new air service is required.[1] Eastern

[1] Eastern does not, of course, ask this Court to rule on "the sufficiency of the evidence" in the proceedings below (*cf.* CAP 11).

would agree that there have been various judicial and quasi-judicial expositions on the *elements* of the public convenience and necessity (*cf.* DAL 4-7), but Eastern respectfully submits that there is no authoritative pronouncement on what *findings* on those elements are necessary to a lawful conclusion as to the public convenience and necessity.

Findings by an administrative body on litigated issues are required to focus the attention of the body on the pertinent facts, and to provide a basis for a reviewing court to determine whether the agency discharged its discretion in the manner prescribed by law or whether it acted whimsically, arbitrarily or capriciously.

Agreeing, then, with Delta (DAL 6) that the *basic* elements of public convenience and necessity are the same as laid down by the Board in *United Air Lines, Red Bluff Operations,* I. C. A. A. 778, 779-80 (1940) (and Eastern has never contended otherwise), the question is, as Capital has suggested (CAP 8, 18), whether the "markets in question could support new and additional competitive service", whether "there was a need for competition" as proposed by the various parties. The answers are matters of fact to be resolved by the greater weight of the evidence before determining the ultimate conclusion of law on the public convenience and necessity. It is "a commonplace of public utility regulation" that "if there be only enough business to support operations by one licensee, there must be only one licensee."[1] *Delta Air Lines, Inc.* v. *Civil Aero-*

[1] Appendix C to Eastern's petition for certiorari, C 8. References to the decision of the Second Circuit below will be to the pages as printed as Appendix B to Eastern's petition for certiorari, and references to the decision of the District of Columbia Circuit in *Delta* v. *CAB* will be to the pages appearing as Appendix C to Eastern's petition, as, for example (B 10) (C 11).

nautics Board, F. 2d , 9 Ad. L. Dec. 2d 863 (D. C. Cir. 1959) (reproduced as Appendix C to Eastern's petition for certiorari). See also *Carroll Broadcasting Co.* v. *Federal Communications Commission,* 258 F. 2d 440 (D. C. Cir. 1958).

Eastern would agree and, indeed, insist, that the answer to the question whether there is a sufficient market for a second, a third, or a fourth air carrier is for the expertise of the Board. But the Board's expertise must be shown to have been rationally exercised. Obviously Eastern does not ask for "precise" (*cf.* CAB 9) dollars and cents estimates of future operating results but Eastern does submit that the Board's answer must contain a "hard core of factual possibility" (*American Airlines, Inc.* v. *Civil Aeronautics Board,* 192 F. 2d 417, 421 (D. C. Cir. 1951)). It is apparent from *Clarke* v. *United States,* 101 F. Supp. 587 (D. D. C. 1951), that the Board must make logical, supportable findings on the need for additional carriers. Surely it is not enough, as the opponents of certiorari contend, to make a mere finding as to the size of a market followed by a *conclusion* that the market is large enough to support an additional carrier *without* consideration of expenses or capacity (see, *e.g.,* CAP 8, 18, DAL 8, 10, NWA 13).[1] If the Board may use that device to

[1] An analysis of the portions of the record cited by Capital, Delta and Northwest to support their assertions that the Board made lawful "findings" that the markets proposed for new competitive service could sustain additional carriers reveals that *all* those findings relate to the *plus,* or revenue, side of the ledger, and *none* to the minus, or expense side:

Party asserting adequate findings	Pages of Joint Appendix Cited	CAB Document Referred to	Nature of Material Cited
Capital	901a-907a	Examiner's Initial Decision	Size of market
Capital	922a-924a	Examiner's Initial Decision	Selection of carrier
Capital	1337a	Board's Formal Opinion	Size of market

decide new route cases, the door to abuse of the Board's power is opened wide. From the statement that "the market has x-number of passengers", the Board could conclude "it can support two carriers", or "twenty carriers", or "two hundred carriers", or any other number the Board might choose to insert. There would be no possible way for a reviewing court to determine whether the Board had exercised its power lawfully. Only *some* balancing of revenues against expenses provides a proper foundation to determine the question.

Party asserting adequate findings	Pages of Joint Appendix Cited	CAB Document Referred to	Nature of Material Cited
Capital	1342a	Board's Formal Opinion	Strengthening of Capital
Capital	1490a-1493a	Order Granting and Denying Stay of Certificates	Diversion from Eastern and others*
Delta	888a-890a	Examiner's Initial Decision	Size of market
Delta	899a-901a	Examiner's Initial Decision	Size of market
Delta	925a-930a	Examiner's Initial Decision	Generalized conclusion as to diversion—no specific findings
Delta	1318a-1319a	Board's Formal Opinion	Agreement with Initial Decision
Delta	1326a-1327a	Board's Formal Opinion	Generalized conclusion that markets will support additional carriers without harm to existing carriers
Delta	1333a-1334a	Board's Formal Opinion	Size and growth of market
Delta	1472a-1477a	Order Granting and Denying Stay of Certificates	Size of market

The Board apparently tacitly concedes that findings of the sort requested by Eastern are essential,[1] since the Board attempts to show it made such findings (CAB 8, n. 7). The Board says the cost estimates of the parties were "considered"; but the *only "consideration"* given

Party asserting adequate findings	Pages of Joint Appendix Cited	CAB Document Referred to	Nature of Material Cited
Delta	1479a-1481a	Order Granting and Denying Stay of Certificates	Diversion*
Delta	1490a-1493a	Order Granting and Denying Stay of Certificates	Diversion*
Northwest....	1320a**	Board's Formal Opinion	Size and growth of market

* None of the "findings" on diversion contain any findings on capacity to be offered by the various carriers, nor the expenses to be incurred.

** Northwest's reference was to page 15210 of the record before the Board, transmitted to the Court below; that page is reproduced at page 1320a of the Joint Appendix below.

Eastern submits that without making findings on the negative side —capacity to be offered and expenses to be incurred—it is impossible to proceed logically from the finding that a given market has so many passengers to the conclusion that it will support x-number of carriers. Eastern does *not* (*cf.* DAL 11) request a "different *sort* of subsidiary finding" to support the conclusion; Eastern requests only some logically necessary finding, without which the conclusion cannot be sustained.

[1] Neither *Federal Communications Commission* v. *RCA Communications*, 346 U. S. 86 (1953), nor *United Air Lines, Inc.* v. *Civil Aeronautics Board*, 155 F. 2d 169 (D. C. Cir. 1946), stand for the proposition that the Courts have excused any requirement for solid factual findings as urged by Eastern (*cf.* CAP 19-20, NWA 15-16, DAL 9-11). *RCA* involved an alleged requirement that findings be made on the claimed benefits of competition and it did not excuse the agency from making proper factual findings upon the economic feasibility of a proposed airline operation; there was no request in that case that findings be made comparing reve-

them was in the Examiner's *recitations* of the evidence of the parties, neither the Examiner nor the Board made any *findings* as to the costs to be experienced, nor were the costs (or capacity) ever related to expectable traffic.

II.

Reply to the answers regarding the *"Ashbacker"* doctrine.

The major matter here urged by the opponents of certiorari (CAP 13-14; NWA 19-23)[1] is that Eastern allegedly did not make a showing of mutual exclusivity before the Board and that there is therefore no conflict between the decision below and that of the District of Columbia Circuit in *Delta* v. *CAB, supra* (Appendix C to Eastern's petition).

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nues and expenses. In *United*, there was no question raised of *adequacy* of *findings* to support a conclusion that a particular service was required by the public convenience and necessity; rather all parties to the proceeding before the Board agreed that the new service was required. The appeal was taken by a disappointed applicant for the route and the issue was the Board's discretion to select between competing carrier applicants. No court has ever been asked (prior to these cases, Nos. 777 and 785 here and below) to pronounce upon the standards of legal adequacy of findings to support a conclusion that a particular service is required by the public convenience and necessity.

The opposing parties support the opinion of the Court below on the theory that in determining public convenience and necessity, and more specifically economic feasibility, an administrative agency need look *only* at the revenue possibilities and *not* at the expense possibilities. Such a radical proposition ought not, in the public interest, to be ignored by this Court. Acutely is this the case in view of the fact that if the Board's speculations are proved in actual practice to be erroneous, the mistake must be paid for out of the Federal Treasury in the form of subsidy, under section 406 of the Federal Aviation Act of 1958. Thus the public at large has a vital financial interest in being assured, through appropriate judicial directives, that the Board will carefully consider the subsidy exposure, resulting from an excess of expenses over revenues, inherent in any new competitive authorization.

[1] Compare the Board's brief (CAB 9).

Eastern has fully demonstrated the square conflict between the two decisions and respectfully refers this Court to pages 21-22 of its petition herein, page 23 of its petition in No. 777, to pages 7-11 of its reply of April 18, 1960 in No. 777, and to joint appendix 1438a-39a in this case and joint appendix 618-19 in No. 777. The conflict is there for all to see and opposing parties have not explained it away.

Eastern does, however, reply to certain misstatements contained in the footnote at page 21 and at page 22 of Northwest's answer. Northwest asserts (NWA 21, note) that in the *St. Louis Case* Eastern utilized evidence introduced by American Airlines, Inc. ("American") to make a showing of mutual exclusivity, that the Court's findings of *prima facie* mutual exclusivity had been established by American, and that (NWA 22) "the findings referred to by the District of Columbia Circuit do not appear in this record and Eastern did not attempt to make up the deficiency by introducing evidence showing economic mutual exclusivity."[1] Contrary to Northwest's contentions, the District of Columbia Circuit carefully and explicitly found that Eastern had made an independent showing of mutual exclusivity before the Board (C 19) quite apart from whatever American might have alleged, a matter treated by the Court in an entirely separate section of its opinion (C 4-C 15). The facts shown by Eastern which the District of Columbia Circuit held were an independent *prima facie*

[1] The contention that Eastern presented no evidence on mutual exclusivity is erroneous and misleading, as is the similar contention of the Board (CAB 5). It is to be noted that no one has alleged that there was *no* evidence from which findings as to mutual exclusivity could be made despite Eastern's alleged failure to present evidence. In point of fact, however, in the proceedings before the Board below Eastern *did* cross-examine Northwest's witnesses on mutual exclusivity (J. A. 175a-84a); Eastern requested subpoenas to obtain information from other parties on mutual exclusivity but the request was denied (J. A. 184a-92a, 273a); and Eastern did present arguments from stipulated factual data on the issue of mutual exclusivity (J. A. 1438a-39a).

showing of mutual exclusivity in *St. Louis* are available to this Court (see J. A. 618-19 in No. 777) and Eastern hopes they will be compared with the identical showing made by Eastern below in *Great Lakes* (J. A. 1438a-39).

Northwest also urges that Eastern subsequently was heard on the application for extension of Eastern's routes into Milwaukee and Minneapolis/St. Paul and received certain restricted authority in those markets (NWA 18-19) and that the *St. Louis Case* was overturned by the District of Columbia Court of Appeals because the Board had expanded it from a regional case into a transcontinental award (NWA 23). Northwest's contentions further illustrate the confusion attending *Ashbacker,* and, as well, the injustice perpetrated upon Eastern. Eastern *never* had a *comparative* hearing[1] with Northwest on Eastern's proposal for a one-stop Florida-Milwaukee-Minneapolis/St. Paul service via Chicago (that being the route awarded Northwest by the Board in *Great Lakes* without concurrent consideration of Eastern's application for that authority). The Board's action in the *Chicago-Milwaukee-Twin Cities Case,* CAB Docket 3207 *et al.,* CAB Order E-13890 (May 19, 1959) *establishes* that mutual exclusivity, as a matter of economic fact, existed between Eastern's excluded application (Docket 3207) and the Northwest proposal granted in *Great Lakes.* Northwest was awarded Milwaukee-Florida and Minneapolis/St. Paul-Florida authority via one stop at Chicago in *Great Lakes;* Eastern was *denied* (in *Twin Cities*) one-stop authority between Milwaukee-Florida and Minneapolis/St. Paul-Florida via Chicago. All Eastern flights in those markets serving Chicago must serve one other point as well. Moreover, in *Great Lakes,* Northwest was awarded Milwaukee-Atlanta and Minneapolis/St. Paul-

[1] The right to a fair hearing is the concern of *"Ashbacker". Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* 228 F. 2d 17, 22 (D. C. Cir. 1955).

Atlanta authority via one stop at Chicago; in *Twin Cities* Eastern was *denied* one-stop authority between Milwaukee and Atlanta, and between Minneapolis/St. Paul and Atlanta. All Eastern flights in those markets *must* serve two intermediate points. Thus the license for a one-stop Milwaukee-Minneapolis/St. Paul-Florida service via Chicago and the license for one-stop Minneapolis/St. Paul-Milwaukee-Atlanta service could be awarded to only one applicant since the Board found the public convenience and necessity required only one, and accordingly Eastern has been denied fair hearing on its application.

But that is only part of the defect in Northwest's position. Northwest was awarded in *Great Lakes* a transcontinental route between Seattle, Portland and its other far western points and the Southeast and Florida via Chicago (see the Board's Joint Opinion, J. A. 1328a-30a)[1] in precisely the same manner that TWA was awarded in *St. Louis* a transcontinental West Coast-Southeast and Florida route via St. Louis. Eastern has *never* been heard on its applications to provide Seattle/Portland-Southeast/Florida service (although it asked that they be heard in the proceedings below (*cf.* NWA 8-9)), since the *Twin Cities Case* did not extend west of Minneapolis/St. Paul. However, in its Petition for Reconsideration before the Board in this case below, Eastern summarized the evidence (J. A. 1438a-39a) to show that only one carrier could be certificated to serve the Seattle/Portland-Southeast/Florida transcontinental route awarded Northwest and the Board made no adequate responsive findings. The Court below, however, ruled that Eastern had not demonstrated mutual exclusivity; but precisely the same evidence, *mutatis mutandis*, that showed

[1] See also Capital's Brief (CAP 29) pointing out that the Board recognized that Northwest received a transcontinental route.

mutual exclusively *vis-a-vis* TWA's transcontinental award in the review by the District of Columbia Circuit of the *St. Louis Case* was presented in this case below and the District of Columbia Circuit reached precisely the opposite conclusion.

Thus, so far as Northwest's contentions that Eastern has subsequently had a hearing on *part* of its excluded applications (albeit not a comparative hearing with Northwest), and that the decision of the District of Columbia in *Delta* v. *CAB, supra,* turned on the point that an area case (the *St. Louis Case*) had become a transcontinental case, are concerned, the answer is that the *Great Lakes Case* (an "area" case) became a transcontinental case, and Eastern has *never* been heard on its transcontinental application.

The matters raised by Northwest show that the circuits are in irreconcilable conflict.

III.

Reply to answers relating to the press release decision procedure.

Eastern respectfully refers this Court to the matters set forth at pages 14-15 of its reply to answers to petition for certiorari in Number 777. The contentions of others do not meet Eastern's claim that Eastern and other litigants are harmfully prejudiced by being subjected to the unauthorized and irregular press release decision procedure.[1]

[1] The "press release" procedure is not a published procedure of the Board. Compare *Columbia Research Corp.* v. *Schaffer,* 256 F. 2d 677, 680 (2d Cir. 1958) ("resort to" as used in §3(a) of the Administrative Procedure Act relieving parties from the obligation to "resort to" a procedure not published by an administrative agency means also that parties will not be held in "subjection to" procedures not published.) (Section 3(a) of the Administrative Procedure Act appears in Appendix A to Eastern's petition for certiorari.)

There has been no effective response to Eastern's showing of the invalidity of the press release decision procedure, nor to Eastern's showing that the procedure is becoming more wide-spread, affecting more litigants in quasi-judicial proceedings. Eastern believes the problem here is of far more consequence than a sterile play on words, to which Capital and Delta would relegate the point (*e.g.*, CAP 15, DAL 13, 17). The matter raised by Eastern is that of "prejudice" in its original sense—"prejudgment." In theory, of course, a prejudiced juror *could* fairly consider a case, but Eastern raises a question of basic fairness founded on the time-honored concept that prejudgments preclude fair trials. The opponents of certiorari, and the Court below (though reluctantly and doubtfully, see EAL 29, B 7), are asking this Court to put the stamp of approval on an admittedly irregular procedure of prejudgment, announcing the decision before all the pertinent facts are considered.[1] Eastern submits that no party has refuted Member Hector's carefully considered opinion that the procedure is unlawful (see EAL 26, 27, 28-30).

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[1] Eastern does not repudiate its stipulation that the Board could rely on traffic and financial data that became available up to time of final decision (*cf.* DAL 15, NWA 27). Eastern's objection is that they were not considered prior to the Board's announced prejudgment despite the fact that they were essential to construction of the formal opinion. (Northwest alleges, NWA 27, that the 1957 data *were* available to the Board before the press release; Northwest refers to certain raw material that are compiled into the final reports. The Board has never alleged that it considered the reports referred to by Northwest in arriving at its "tentative" decision, and Capital concedes that they were unavailable as Eastern had said, CAP 22, as, apparently, does Delta, DAL 15. Moreover, no party below challenged an affidavit, not printed in the record below certified to this Court, submitted by Eastern's Director of Research that the data were unavailable to the Board. That affidavit was submitted in connection with Eastern's petition for stay in the Second Circuit.) Having arrived at its decision, and publicly proclaimed it by press release, the 1957 data did not enter into the decision-making process even though they were relied upon to support the formal opinion. Eastern does not object to the Board's considering those data, it only requests that they be considered *before* the Board makes up its collective mind.

IV.

Reply to answers respecting Capital's *ex parte* contacts with the Board.

The question here is whether this Court will condone *ex parte* contacts by litigants to administrative agencies designed to influence judicial proceedings before agencies. Capital (CAP 15-17, 24-28, 29-31) and the Board (CAB 10-12) effectively ask this Court to permit administrative agencies and parties to conceal improper off-the-record actions by a simple denial that any unauthorized procedures were used.

Accepting as correct the Board's assertion (see, *e.g.*, CAB 10) that its decision was not influenced by the unlawful contacts, nevertheless the emerging law with respect to *ex parte* contacts with administrative agencies during the course of contested administrative proceedings shows that, at the very least, a hearing was required to determine whether or not improper *ex parte* contacts were actually made[1] with the intent to influence the decision.[2] Eastern submits that the question of Capital's intent in the telegram to the Board is a matter of fact to be resolved only by the Board itself, in the first instance. Capital errs

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[1] That Capital acted through an aircraft manufacturer instead of through one of its own officers is surely immaterial. A party cannot avoid the consequences of his conduct by employing an agent to act for him. Eastern assumes that the Board is not suggesting (CAB 11) that the law expressed in the television cases can be avoided by a party through the simple device of procuring covert communication through an agent. *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 221 (D. C. Cir. 1959). In *WKAT, Inc.* v. *Federal Communications Commission*, 258 F. 2d 418 (D. C. Cir. 1958), the *ex parte* contacts were not made by an official of the applicant, but by an agent.

[2] The law on this point appears to be clear in view of *Sangamon, supra*, and *WKAT, supra*.

(CAP 16, 25) in stating there is no controversy as to the extent and nature of the communications between Capital and the Board. To be sure, the matter cannot be resolved definitely without hearing, but certainly the timing of the telegram to the Board (immediately before argument) and the controversy as to Capital's fitness to operate new routes in view of its equipment program (see EAL 32-33[1]) are such to suggest strongly that the *intent* was to influence the proceeding.

It is no answer to suggest that Capital can save itself by the fortuitous circumstance that the factual matters alleged in the telegram *might* have been relevant to other matters unrelated to the litigated controversy[2] as suggested by the Court below and by the parties (see, *e.g.*, CAB 10; CAP 16-17, 26-27). Capital disingenuously suggests that because the telegram did not refer *in haec verba* to the *Great Lakes-Southeast Case* there was no indication that

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[1] The Board (CAB 11, n. 8) misstates Eastern's recital of Bureau Counsel's activities regarding Capital. Eastern did not suggest that Bureau Counsel shifted his position *back* to favoring Capital as a result of the *ex parte* activity. Rather Eastern showed that Bureau Counsel had originally supported Capital for the route ultimately awarded it but changed his position to support another carrier as a result of discovering subsequently that Capital would *not* have adequate equipment to operate the proposed routes. The purpose of that discussion was to illustrate that Capital's fitness, *i. e.*, its equipment program, was a highly controversial issue. Eastern did not suggest that Bureau Counsel re-shifted because of the telegram; in any event, Bureau Counsel's action was irrelevant to the point here raised since he participated as an independent party, and not as a decision-maker.

[2] If the telegram was related to a pending investigation of passenger fares, then surely it was improper in view of the fact that that proceeding was one to be decided on a record after hearing and was in the process of litigation. (See EAL 34; see also CAP 17.) It is rather shocking, to say the least, that Capital (CAP 16, 26), the Board (CAB 10), and the Court below (B 9) all sought to excuse Capital in the case below by claiming that the telegram might have been a relevant, but nevertheless unauthorized *ex parte*, communication in *another* case before the Board.

it should have been considered in connection with that proceeding. However, the fact is that there was no indication that it should have been considered in connection with a possible acquisition of control situation under section 408 of the Federal Aviation Act of 1958 (or in connection with any other Board function). Indeed, on response to inquiry from the Chairman of the Civil Aeronautics Board, Capital specifically disavowed the existence of any section 408 question (see, *e.g.*, EAL 33-35). The method used by Capital to advise the Board of its equipment program was, to say the least, unique, and if Capital had intended to relate it to a section 408 proceeding, there are formal methods available by which proper application in duly authorized form may be made publicly (and, indeed, are required to be made publicly in the absence of a specific showing of the need for secrecy) for approval. There was no emergency in the matter of Capital's advising the Board of its equipment program, a fact that is easily shown since now, more than two years later, Capital *still* has not consummated the "agreement" referred to in the telegram. Certainly there was no justification for the covert communication to the Board in a dramatic telegram arriving one day before oral argument in the proceeding below. While the quite attenuated relationship alleged between the factual matters asserted in the telegram and other regulatory functions of the Board was approved by the Court below under the doctrine of *Van Curler Broadcasting Corp.* v. *United States,* 236 F. 2d 727 (D. C. Cir.), *cert. denied,* 352 U. S. 935 (1956), an examination of that case shows that the Court below went far beyond *Van Curler* in condoning *ex parte* contracts. The operative factor in *Van Curler* was that the Federal Communications Commission had sent inquiries and solicited replies from the industry on certain pending deinter-

mixture proceedings and the alleged *ex parte* communication of Columbia Broadcasting Corporation in that case was shown to be in response to the general inquiry and not specifically related to the litigated controversy. No such facts are present to exculpate Capital in this situation and this Court is respectfully requested to redefine the limits to which a party may go in covertly communicating with an administrative agency which is deciding a litigated controversy concerning the party secretly contacting it and, moreover, to clarify the requirements that administrative agencies hold hearings to determine the fitness of applicants for new licenses resorting to such unauthorized and improper procedures.

Conclusion.

WHEREFORE, Eastern respectfully prays that the answers of the other parties hereto be denied and that a writ of certiorari issue.

Respectfully submitted,

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